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IN THE

Supreme Court of the United States

OCTOBER TERM, 19

LARRY TABELING,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER PETITIONER WAS UNLAWFULLY SEIZED DURING HIS ENCOUNTER WITH FEDERAL AGENTS AND LOCAL POLICE OFFICERS IN A DENVER AIRPORT DURING THE EVENING OF MARCH 21, 1978?

WHETHER PETITIONER'S DECLINATION TO ANSWER CERTAIN QUESTIONS FOLLOWING HIS SEIZURE AT THE DENVER AIRPORT (AND AFTER BEING GIVEN AND INVOKING HIS MIRANDA WARNINGS) WERE THE PROPER SUBJECT OF INTRODUCTION AT TRIAL; OR WAS THE ADMISSION OF SUCH EVIDENCE VIOLATIVE OF THE FIFTH AMENDMENT?

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I.

LARRY TABELING, (hereafter petitioner), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his controlled substance convictions in the instant case.

II.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is not reported. It is reproduced as Group Appendix A to this petition.

III.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 27, 1982. A timely petition for rehearing was filed with suggestions that the case was appropriate for *in banc* hearing; this was denied on September 27, 1982. The order denying rehearing is set forth as Appendix B *infra.*[1] This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1). This petition for certiorari is filed within the period of time set forth under Supreme Court Rule 20.1.

IV.

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Pursuant to Supreme Court Rule 21.1 (f) the following constitutional provisions, rules and statutes are set forth in the Appendix:

U. S. Constitution, Fourth Amendment
U. S. Constitution, Fifth Amendment
21 U. S. C. § 841 (a) (1)
21 U. S. C. § 846
18 U. S. C. § 2

The constitutional provision and statutory references are reproduced as Appendix D, *infra.*

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[1] On October 14, 1982, the Court of Appeals for the Seventh Circuit entered an order staying the mandate pending this petition for certiorari (Appendix C, *infra*).

V.

STATEMENT

(1). In December, 1980, the petitioner was charged (along with co-defendant Sam Jones) with violating the federal drug laws (21 U. S. C. § 846 . . App. D, *infra*). That indictment, in two counts, was returned in the Central District of Illinois, Danville Division. A superseding indictment was returned in January, 1981 charging the same offenses in the same counts but in a more detailed fashion. At all times herein pertinent, the petitioner was represented by private counsel and he was enlarged on bail. Petitioner had a jury trial commencing April 1, 1981 in the U. S. District Court, Danville, Illinois and on April 9, 1981, that jury returned guilty verdicts on both counts of the indictment. On June 22, 1981, a custodial sentence was imposed.[2]

(2). As may be pertinent to this petition it was claimed below and it is within the contours of this petition, again claimed, that the entire jury trial was flawed by virtue of pretrial rulings relating to the admissibility of certain evidence seized from the petitioner at an airport in Denver, Colorado on March 21, 1978.

After the instant indictment was returned a federal magistrate conducted a suppression hearing involving the March 21, 1978 arrest of the petitioner at the airport in Denver, Colorado. At that pretrial suppression hearing evidence was taken from a DEA Agent, Weaver. Agent Weaver testified that a Florida

[2] The petitioner received a five (5) year sentence and a $5,000 fine on count 1; a ten (10) year sentence and a $5,000 fine on count 2; the custodial sentences to run concurrent and the sentences were imposed pursuant to 18 U. S. C. § 4205 (b) (2). By order of the Court of Appeal for the Seventh Circuit, the petitioner remains enlarged on bail pending disposition of this petition.

Police Officer contacted the Denver, Colorado DEA offices and Weaver learned from a Miami Police Officer that the petitioner had boarded an aircraft from Miami to Denver and that the Florida Police Officer *suspected* that the petitioner was carrying a quantity of cocaine. The factors leading the Miami Police Officer to so conclude . . included the following:

(A). The petitioner bought a one-way ticket to Denver approximately ten (10) minutes prior to that flight departing;

(B). The petitioner walked down the concourse at the Florida airport in a suspicious manner (petitioner would walk, stop, reverse directions (??))[3] . . and then

(C). The petitioner had little if any luggage.

The Florida Police Officer also provided Agent Weaver with a complete description of the petitioner as well as the name of the airline and the flight number (R. 47, Tr. 17).

During the evening hours of March 21, 1978, Weaver watched the petitioner debark the flight and watched him walk toward the main terminal . . reverse directions . . and then the petitioner [would] stand "in such a manner [as] to observe persons going by him and in his immediate vicinity" (R. 47, Tr. 18). The petitioner then went to the public telephones . . and made two (2) telephone calls . . and then walked out of the airport. That is the saga up to the point where Agent Weaver then approached (arrested or seized??) the petitioner as the

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[3] The February 5, 1981 pretrial suppression hearing was conducted before a federal magistrate in Danville, Illinois. The transcript of that proceeding is included in the original record at R. 47. The conduct considered suspicious by the Florida Police Officer is reported at R. 47, Tr. 14-17. The Florida Police Officer was not called as a witness either during the suppression hearing or at trial.

Parenthetically we wonder as to the accuracy of the Miami Police Officer's observations when there were only 10 minutes from the purchase of the ticket (in petitioner's own name) to the boarding of the flight to Denver.

petitioner was standing outside of the airport in an area where the taxicabs would pick up passengers. Weaver requested that the petitioner go with him into the security office which was some 30 yards from the cabstand (Tr. 20). Once in the security office Petitioner was advised of his constitutional rights *per Miranda* (Tr. 20) and Weaver requested that the Petitioner provide identification. All Petitioner had were tickets and hotel receipts . . "this sort of thing" . . with his name on it (Tr. 20). Also in the room at this time, was at least one other DEA Agent and a local Denver police officer (Tr. 21). As regarding the suitcase . . Weaver asked him what was in it (a carry-on type handbag) and according to Weaver, the Petitioner said that Weaver was free to look inside it (Tr. 21). Inside the carry-on handbag was $38,000 in U. S. Currency (Tr. 22).

Weaver questioned the Petitioner as to the ownership of the money, the Petitioner declined to state who owned the money or how the Petitioner came into possession of the money (Tr. 22).[4] DEA Agent Weaver thereafter, contacted an IRS Agent who came and interviewed the Petitioner in the same security office (Tr. 23). Thereafter, Petitioner was given a receipt for the money (Tr. 22). In addition, the agents took an airline ticket and a hotel receipt . . the hotel receipt had the name JONES on it (Tr. 23). Thereafter, Weaver testified that the Petitioner was released and his property returned (other than the hotel receipt, an airline ticket, and the monies; (Tr. 23)).[5]

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[4] This conversation follows the giving of *Miranda* warnings by Weaver to the Petitioner (Tr. 20). All of this took place in the security office where there were at least three law enforcement agents and the petitioner (Tr. 20-21).

[5] Petitioner was not released. Petitioner was remanded to the local authorities, retained in custody and released the following day. (Tr. 658-663).

During the suppression hearing before the magistrate the agent was allowed to testify, over objection, to the following:

"Q. Were you aware, Agent Weaver, on the day of certain characteristics that were known to you in your professional capacity and particularly as an agent who had worked six months or more at an international airport—

A. Yes, Ma'am.

Q. —of certain characteristics attributable to drug dealers?

A. Yes, Ma'am.

MR. VOLPE: Objection to that.

THE COURT: Overruled.

Q. Would you start what characteristics were, what the behaviors were, that you looked for in surveilling people in the Denver airport with an eye toward narcotics trafficking.

A. We looked particularly for people who purchased one-way, cash-purchase tickets to known distribution areas.

MR. CUTRONE: I'm sorry. I didn't hear that.

THE COURT: To known distributions areas.

A. Also, persons who were returning under the same circumstances from known distribution areas. People with no checked luggage. Most usually traveling by themselves. People who boarded flights at the last possible moment.

Q. As you observed Mr. Tabeling on the 21st of March, did you see, observe, characteristics that you recognized?

A. Yes, Ma'am.

Q. Would you just list those again. I believe you testified about them already.

A. Well, speaking specifically of his actions upon deplaning in Denver, the manner in which he proceeded down the concourse: stopping, reversing direction, varying the speed of his movement down the concourse, particular interest in people behind him and to each side of him.

MR. VOLPE: Objection to that.

THE COURT: It will be overruled."
(Pretrial Suppression Hearing, Tr. 28-29).

The magistrate recommended that the motion to suppress be denied and that order was affirmed by the trial judge (R. 24).

(3). During trial Agent Weaver reviewed the same evidence and identified government exhibit 1 as a hotel receipt with the name of Jones and Tabeling (Tr. 355). The Agent also told the trial jury . . "I asked Mr. Tabeling who Sam Jones was and he replied 'that's me sometimes' " (Tr. 355). Additionally, Agent Weaver told the trial jury . . as to the $38,000 . . "when I asked him if it did not belong to him, to whom did it belong, HE DECLINED TO IDENTIFY THE PARTY THAT OWNED THE CASH" (Tr. 358). The trial court overruled objections to the witnesses testimony that Petitioner declined to identify the owner of the money and a motion for a mistrial was denied (Tr. 358-361).

The government, during closing argument, reminded the jury that it was rather unlikely that the Petitioner would be carrying $38,000 . . when it could have been in a bank earning interest and not recently retrieved from a safe deposit box. In addition, the government urged the jury to consider why it was that the Petitioner didn't tell the agents, *post Miranda warnings*

. . the same thing that the Petitioner testified to during the jury trial (Tr. 827-829).[6]

(4). After the jury verdict of guilty, the Petitioner prosecuted a timely appeal. As regarding the question presented herein . . the Appellate Court, while affirming the conviction and sentence, stated:

> "1. Tabeling clams that he was unlawfully searched and seized at the Denver airport. This contention is refuted by this court's opinion in *United States v. Black*, No. 81-1883 (7th Cir., April 6, 1982), ____F. 2d____."
> (see Appendix A, *infra*).

The decision referred to by the Court of Appeals while affirming Petitioner's conviction is *U. S.* v. *Black*, 675 F. 2d 129 (CA 7, 1982) (Swygert, Sr. Cir. J., dissenting) (cert. pending, *Black* v. *U. S.*, No. 81-2239).

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[6] The Petitioner testified on his own behalf before the trial jury (Tr. 640-738). As regarding the $38,000, the petitioner testified that this was used for the purchase of plants (Tr. 655-657). The trial evidence showed that the Petitioner was in the business of buying and selling plants and that he would purchase plants in Florida, for cash, and have the plants shipped into Illinois so that they might be sold (Tr. 648-663).

The trial court's ruling adopting the magistrate's recommendation declining to suppress the physical evidence and statements allowed the government to fully cross examine on the $38,000 (Tr. 717-720).

Of course, the same ruling allowed the government to fully argue to the jury the entire Denver airport saga as probative evidence of guilt. The only physical evidence offered by the government at this jury trial were the items seized from the petitioner on March 21, 1978 at the Denver airport.

VI.

ARGUMENT

REASONS FOR GRANTING THE PETITION

(1). This case presents an important and recurring question concerning the scope of the Fourth Amendment as it pertains to persons within a large public airport. The Court of Appeals held, without explanation, that the Petitioner's contention is [was] refuted by another Seventh Circuit decision, *U. S.* v. *Black*, 675 F. 2d 129 (CA 7, 1982), cert. pending, *Black* v. *U. S.*, 81-2239 (1982).

(2). The decision below fails to take into consideration the differences not only as between *Black* and the instant case, but, further, the decision below fails to take into account any number of decided circuit decisions . . all to the contrary.[7]

(3). In *U. S.* v. *Black, ante,* the facts which allowed for the permissible warrantless airport arrest included:

(a). Black was the first passenger off the aircraft from Ft. Lauderdale; and

(b). Black exited the plane in a speedy fashion and was in a disoriented state; and

(c). He appeared to be nervous as he walked through the concourse and viewed the flight information screen.

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[7] *U. S.* v. *Jefferson*, 650 F. 2d 854 (CA 6, 1981) (reversing airport drug conviction finding a seizure of the person under circumstances similar to those at bar); *U. S.* v. *Patino*, 649 F. 2d 724 (CA 9, 1981) (reversing drug conviction in airport situation for similar reasons); *U. S.* v. *Place*, 660 F. 2d 44 (CA 2, 1981) (reversing similar conviction in airport situation finding an impermissible seizure of the defendant and thus voiding the conviction).

Following the Court's granting certiorari in *Place* (102 S. Ct. 2901 (1982)) the Court heard oral argument in *Florida* v. *Royer*, 102 S. Ct. 631 (1981). *Royer* involved facts similar to those proffered within this Petition.

In *Black* the Court reviewed the objective factors and thereafter announced:

> Despite the Supreme Court's recognition that "a trained officer draws inferences and makes deductions ... that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *see Mendenhall*, 446 U.S. at 563, 100 S.Ct. at 1882 (Powell, J., concurring) (quoting *Brown v. Texas*, 443 U.S. 47, 52 n.2, 99 S.Ct. 2637, 2641 n.2, 61 L.Ed.2d 357 (1979)), it is clear that under the *Reid* standard, these factors alone would not justify a *Terry* stop.
>
> (675 F. 2d at 137).

It is the Petitioner's position that he was impermissibly "seized" at the Denver airport on the evening of March 21, 1978.[8] Petitioner was removed from the cabstand outside of the Denver airport into a closed security office. In that closed security office were the Petitioner and at least three (3) law enforcement agents, presumably armed.[9] It is unlikely, at best, to assume that the Petitioner thought he was free to leave. Such a scenerio can hardly be within the realm of the citizen providing voluntary co-operation through non-coercive questioning. Indeed, one might simply imagine ... rather than experience, the interplay as between the agents and the Petitioner.

The Petitioner had already been selected for the encounter. That much was admitted by agent Weaver during the February 5, 1981 suppression hearing before the federal magistrate. The Petitioner was singled out for the seizure even prior to his

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[8] In *Mendenhall*, a majority of the Court found no occasion to decide whether a citizen-police contact constitutes a seizure within the meaning of the Fourth Amendment in the absence of police conduct that would cause a reasonable person to believe that he was not free to leave. See 446 U. S. at 560 (opinion of Powell, J.); *id.* at 568-571 (White, J., dissenting).

[9] Similar commentary came from members of this Court during the oral argument in *Florida* v. *Royer* on October 5, 1982.

arrival at the Denver airport. So much was likewise conceded by Agent Weaver during the suppression hearing (id. at Tr. 13-20). Is it reasonable to assume that the Petitioner *felt* he was free to leave a closed security office surrounded by armed agents when he had been taken into the security office from the public cabstand?? It must be remembered that this was not just a casual encounter with the police in the airport; the agents had definately identified the Petitioner as a suspect for investigation. The stopping of the Petitioner at the cabstand and removing him to the closed security office conveyed an air of authority indicating that the Petitioner was hardly free to leave.[10]

(4). In *Brown* v. *Texas*, 443 U. S. 47 (1979) Chief Justice Burger, wrote, the following, for an unanimous Court:

> "When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. In convicting appellant, the County Court necessarily found as a matter of fact that the officers "lawfully stopped" appellant. See Tex.Penal Code Ann., Tit. 8, § 38.02 (1974). The Fourth Amendment, of course, "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Terry v. Ohio*, 392 U. S. 1, 16—19, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). " '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' *id.*, at 16, 88 S.Ct., at 1877,"
>
> (99 S. Ct. at 2640).[11]

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[10] Cf., *U. S.* v. *Patino*, 649 F. 2d at 726-727 (CA 9, 1981).

[11] In *U. S.* v. *Elsoffer*, 671 F. 2d 1294 (CA 11, 1982) the Court, while affirming the drug conviction after an airport stop situation found ... that the retention of that defendant's airline ticket and identification constituted a "seizure" within the Fourth Amendment (671 F. 2d at 1297). Nevertheless, the Court affirmed the conviction because of the unusual size and shape of a *bulge* on Elsoffer's person (id. at 1298-1299).

In our case, the government does not even intimate the presence of any "bulge" on petitioner's person.

In *Reid* v. *Georgia*, 448 U. S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980), seven justices found that a DEA agent lacked probable cause to stop two airline passengers so that the evidence obtained had to be suppressed.

In *Reid*, the Court held that DEA agents did not have a founded suspicion which would justify stopping the defendant when he arrived on a flight. In that case the agents contended that they had a well-founded suspicion because: (1) the defendant was traveling from Fort Lauderdale, a known source of cocaine; (2) the defendant arrived in the early morning when law enforcement activity was minimal; (3) the defendant appeared to be trying to conceal the fact that he was traveling with a companion; and (4) the defendant's only luggage was a shoulder bag. The Court concluded that "the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." 100 S. Ct. at 2754.

(5). It is our position that the Petitioner in this case was subject to an impermissible seizure. Here Agent Weaver did not merely stop the Petitioner to ask him a few questions. Upon intercepting the Petitioner in the public cabline outside the airline, the agent identified himself and requested [directed?] that the Petitioner accompany him to a security office ... away and apart from the cabstand. Under such circumstances, the Petitioner could not reasonably believe he was free to leave; this was a "seizure" within the Fourth Amendment.[12] The seizure lacked any probable cause whatsoever in that the only conduct ascribed to the Petitioner was that of any ordinary

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[12] Seizure *vel non* within the airport syndrome has yet to command a majority of the Court. In *U. S.* v. *Jefferson*, 650 F. 2d 854 (CA 6, 1981) the Court vacated the drug conviction finding under strikingly similar circumstances that an impermissible seizure of that defendant had occurred. The Court in *Jefferson* commented as regarding this Court's declination to reach a consensus as regarding when a seizure takes place within an airport ... 650 F. 2d at 856, n. 1.

traveler (using the public telephones, being alone, carrying a single shoulder bag, looking around as one walked through the concourses). No other realistic *indicia* of any criminal offense was present.[13]

(6). The government's conduct extended to the use of silence after the administration of *MIRANDA WARNINGS.*

Agent Weaver testified at the suppression hearing that when the Petitioner was first taken into the security office, he was given his "*rights per Miranda*" (Tr. 20). Thereafter, the Petitioner declined to answer questions as to the ownership of the currency and how it was that the Petitioner came into possession of the currency (Tr. 22). In the presence of the trial jury Agent Weaver repeated the declination of the defendant to discuss the money (Tr. 356-361). A timely trial objection was offered as was a motion for a mistrial and a request to strike Weaver's comments as regarding possession and ownership of the monies (Tr. 356-361). The Petitioner repeats that the physical exhibits offered by the government in this drug-conspiracy trial were the exhibits seized from the Petitioner at the Denver airport in March of 1978. No other or additional physical exhibits were offered.

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[13] The Petitioner, of course, *had no drugs either on his person or in his possession.* Accordingly, the agents seized U. S. Currency. We were unaware that the government could simply seize currency from a citizen-traveler at their "whim" or "fancy". But, that is exactly what the government agents did in this case.

> Putting the gloss of reality into the circumstances at bar, what we really have is the warrantless arrest of the petitioner, the seizure of his person into a "secured" security office (in the company of at least 3 armed law enforcement agents), the giving of "Miranda Warnings" and . . . the government's theory that all of this was voluntary. Under such circumstances to assume the voluntary nature of anything done by the Petitioner would be to blink at reality.

(7). It is the position of the Petitioner that after the giving of Miranda Warnings . . . the government could not thereafter utilize the actual invocation of those rights by the Petitioner. However, regrettably, that is exactly what the government did in this case. Indeed, the government argued to the trial jury during their closing argument the fact that the Petitioner didn't tell the agents about the ownership and possession of money when he was stopped at the Denver airport on March 21, 1978 (Tr. 827-829). No curative instruction was given the jury.

(8). In *U. S.* v. *Hale,* 422 U. S. 171, 95 S. Ct. 2133 (1975), the Court held that post arrest silence could not be used to impeach the defendant's testimony at trial. This rule seemed to come under the Court's supervisory powers. However, in *Doyle* v. *Ohio,* 426 U. S. 610, 96 S. Ct. 2240 (1976) the Court held that silence after the Miranda Warning may not be used at trial when the defendant testifies.

The Circuit Courts have consistently precluded the government from arguing guilt based upon the exercise of constitutional protections. For example, in *U. S.* v. *McDonald,* 620 F. 2d 559 (CA 5, 1980) and *U. S. ex rel. Macon* v. *Yeager,* 476 F. 2d 613 (CA 3, 1973) the Courts reversed convictions where the prosecution . . . urged as evidence of guilt . . . the desire of *McDonald* and *Macon* . . . to have counsel in post arrest situations. The government's comments in *McDonald* . . . were such that the HARMLESS ERROR TEST WAS . . . PER SE INAPPLICABLE (620 F. 2d at 564-565). In *Macon,* the Court similarly ruled that the defendant's exercise of the constitutional rights (Fifth and Sixth Amendments) . . . were well beyond the framework of the harmless error doctrine (476 F. 2d at 615-617).

In *U. S.* v. *Prescott,* 581 F. 2d 1343 (CA 9, 1978), the Court again reversed a federal conviction finding that the government may not be permitted to comment on the exercise of a defendant's Fourth and Fifth Amendment protections (581

F. 2d at 1350-1353). The Court . . . while reversing . . . saw fit to remind the government that . . .

> "Inadmissible evidence which can readily be misinterpreted by the jury, should not be admitted just to put the relevant facts in their true setting. For the reasons stated in *HALE, DOYLE,* AND *GRUENWALD SUPRA,* the facts in issue are so ambiguous as to be irrelevant. Moreover, they are so readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value." (cit om.) 581 F. 2d at 1352).

In *U.S.* v. *Massey,* 687 F. 2d 1348 (CA 10, 1982) the Court reversed a similar drug conspiracy conviction where the Government in that case . . did exactly what the U.S. attorney did in this case. While reversing the MASSEY convictions the Court stated:

> "The use of a defendant's post-arrest silence to impeach an exculpatory story told for the first time at trial violates the Fourteenth Amendment's mandate of due process if the silence follows the giving of *Miranda* warnings.[1] *See Fletcher v. Weir,* ___ U. S. ___, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982); *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). Impeachment on the basis of a defendant's silence following warnings is "fundamentally unfair because *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him . . . . Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." *Anderson v. Charles,* 447 U.S. 404, 407-08, 100 S.Ct. 2180, 2181-82, 65 L.Ed.2d 222 (1980)." 687 F. 2d at 1353.

VII.

CONCLUSION

The Petitioner, Larry Tabeling, respectfully urges that his Petition For A Writ of Certiorari be granted.

Respectfully submitted,

November 1982.

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